

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Order Instituting Rulemaking to Consider the)
Adoption of a General Order and Procedures to)
Implement the Digital Infrastructure and Video) Rulemaking 06-10-005
Competition Act of 2006.)

REPLY COMMENTS OF VERIZON CALIFORNIA INC.

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Verizon California Inc. (Verizon) respectfully submits this reply addressing opening comments¹ regarding Commissioner Chong's Proposed Decision (PD) implementing the provisions of the Digital Infrastructure and Video Competition Act of 2006 (DIVCA).

I. CONFIDENTIALITY MUST BE PRESERVED, NOT PREJUDGED

Several parties commented that companies must retain the right to assert confidentiality of information submitted to the Commission in proceedings under DIVCA, e.g., broadband reports and the number of video subscribers,² annual gross state franchise video revenues,³ build-out data,⁴ and employment data.⁵ Verizon has consistently emphasized the need for confidentiality in a market where new entrants compete with established players, and agrees with these points.

The Small LECs are correct that existing laws⁶ continue to protect confidential data, regardless of whether DIVCA affords "special confidentiality protections."⁷ Under consistent application of an "overriding principle" of statutory interpretation, "individual portions of a statute should be harmonized with each other and the entire statute harmonized with the body of law of which it forms a part."⁸ DIVCA is easily harmonized with existing law by allowing submitting parties to assert confidentiality at the time information is submitted, and rely on such treatment unless and until the Commission orders otherwise.⁹ The PD should not prejudice the issue.

¹ The following parties submitted comments: Verizon California Inc., AT&T California (AT&T), SureWest TeleVideo (SureWest), The Division of Ratepayer Advocates (DRA), The Utility Reform Network (TURN), California Cable and Telecommunications Association, California Community Technology Policy Group and Latino Issues Forum (CCTPG/LIF), The Greenlining Institute, The Consumer Federation of California (CFC); The County of Los Angeles, California, The City of Los Angeles, California, and The City of Carlsbad, California; Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Global Valley Networks, Inc., Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles Telephone Company, The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company, and Winterhaven Telephone Co. (Small LECs)

² AT&T at 7.

³ AT&T at 8.

⁴ Small LECs at 10.

⁵ AT&T at 9.

⁶ See, e.g., Public Utilities Code § 583 and the Commission's General Order 66-C (implementing the Public Records Act, Government Code § 6250 et seq.).

⁷ PD at 143-144; Small LECs at 10.

⁸ *People v. Pappalardo*, 12 Cal. App. 4th 1723, 16 Cal. Rptr. 2d 512 (1993)(citation omitted). See *Landrum v. Superior Court*, 30 Cal. 3d 1, 177 Cal. Rptr. 325 (1981)(every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect; citations omitted).

⁹ Pub. Util. Code § 583.

II. DIVCA’S APPLICATION PROCESS DOES NOT ALLOW FOR PROTESTS

Several commenting parties oppose the PD’s conclusion that DIVCA’s carefully-prescribed application process and timeline are inconsistent with allowing protests. However, their arguments are unavailing.

Several parties try to characterize the application review process as highly discretionary, claiming error in the PD’s assertion that it is ministerial. CCTPG/LIF, for example, cite repeatedly to *Friends of Westwood, Inc. v. City of Los Angeles* in arguing that the DIVCA application is *not* ministerial.¹⁰ That case is inapposite. It analyzed the terms “ministerial” project and “discretionary” project as those terms are used in the California Environmental Quality Act, Public Resources Code §§ 21080(b)(1), (a) (CEQA). But as TURN points out, the word “ministerial” does not appear in DIVCA, so its interpretation is not at issue, and CCTPG/LIF’s argument misses the point.

CFC likewise errs in arguing that the Commission’s discretion in developing its General Order somehow demonstrates that staff-level review of applications involves similar discretion.¹¹ In fact, the opposite is true. In its PD, the Commission takes the already tightly-circumscribed scope of DIVCA’s application process and further defines its requirements (e.g., through an application form and other specific requirements) so that the review and approval process is purely ministerial. In the words of CFC’s own cited authority:

“To the extent that grant or denial of the . . . permit is governed by fixed . . . specifications in statute or regulation, the official decision of conformity or nonconformity leaves scant room for the play of personal judgment.”¹²

As this case shows, it is the detailed application specifications and process, limited scope of authority to decide completeness or incompleteness, and the mandatory time frames prescribed by DIVCA, that preclude any need for a protest process.¹³ The legislative

¹⁰ *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal. App. 3d 259 (1987); CCTPG/LIF at 1, 2, 3; see also CFC at 6.

¹¹ CFC at 6–9.

¹² *People v. Dept of Housing & Community Dev’t*, 45 Cal. App. 3d 185, 192 (1975), quoted in CFC at 2.

¹³ Some parties claim that the Commission must exercise discretion in determining whether the applicant provides “adequate assurance” of financial, legal and technical qualifications. CFC at 3. This inquiry carries little discretion. These factors are well-familiar to Commission staff and, in any event, DIVCA provides that the Commission may “accomplish *these requirements*” through a bond, which the PD proposes to do.

history confirms this, making clear that, “[u]nlike the local franchising process, the state-franchising process *is intended to be largely ministerial*.”¹⁴

Finally, some parties propose an accelerated protest process that will purportedly operate within the confines of DIVCA.¹⁵ However, these claims are not grounded in reality. Engaging the Commission’s formal decision-making process through protest takes several months, as Greenlining recognizes;¹⁶ doing so would clearly violate DIVCA’s timeframes and result in a franchise “deemed [issued]” under § 5840(h)(4).

III. EXISTING PROHIBITIONS ON CROSS-SUBSIDIZATION ARE AMPLE

Several parties assert the need for increased reporting to enforce the cross-subsidization prohibition following DIVCA’s two-year freeze on “stand-alone, residential, primary, basic telephone service.” No action is needed now in light of the rate freeze, and no further action is needed here,¹⁷ as existing Commission requirements amply support DIVCA enforcement. These provisions include the following:

- ***Tariffing requirements.*** Current law prohibits detariffing of basic exchange service.¹⁸ Thus, even though the Commission is considering detariffing in URF, the service for which DIVCA prohibits rate increases is not eligible for detariffing, absent legislative amendment.
- ***URF.*** The URF proceeding is currently examining the implementation of one-day advice letters, and may consider rules for this service.
- ***CHCF-B.*** The High Cost Fund-B Proceeding is examining fund operation for AT&T, Verizon, Frontier and SureWest.
- ***FCC Cost Allocation Rules and the Cost Allocation Manual (CAM).*** The main purpose of these rules is to prevent improper cross-subsidization in services to affiliates.¹⁹

Parties’ objections to reliance on FCC ARMIS reports are also unavailing. Where basic telephone rates are no longer based on cost, and the market faces extensive

¹⁴ Senate Floor Analysis, AB 2987 (August 28, 2006) (emphasis added).

¹⁵ CFC proposes a 15 day protest period. CFC at 11.

¹⁶ Greenlining proposes a 15 day protest cycle, 15 day hearing determination, and **120 days** for a Commission decision. Greenlining at 11. Indeed, a review of the Commission website (the contents of which are subject to official notice) shows that, over the past two years, 79 protested advice letters took an average of approximately six months to reach decision. Verizon will provide a copy of this review on request.

¹⁷ DRA at 11. DRA proposes that these issues be addressed in Phase 2 of this proceeding.

¹⁸ See Pub. Util. Code § 495.7(b).

¹⁹ See, e.g., *In the Matter of Federal-State Joint Conference On Accounting Issues; 2000 Biennial Regulatory Review -- Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase II; Jurisdictional Separations Reform and Referral to the Federal-State Joint Board; Local Competition and Broadband Reporting*, WC Docket No. 02-269, CC Docket Nos. 00-199, 80-286, 99-301, Report and Order, 19 FCC Rcd 11732, 11746–7 at ¶ 50 (June 2004).

intermodal competition, carriers like Verizon have neither the incentive to overstate cost nor the ability to raise basic rates above a market-based price.²⁰ Cross-subsidy implies the ability to sustain above-market rates, and competition constrains that. In addition, TURN mixes apples and oranges in its claim that DSL transmission – an interstate service – has been exempted from Part 64 reporting.²¹ Video service remains subject to Part 64, for which compliance is subject to annual audit.²² And as explained before, TURN’s allegations of “noncompliance” with Part 64 are unwarranted for Verizon.²³ Thus, TURN’s and DRA’s cumbersome proposals to return to detailed cost-of-service allocations and reporting of the financial and engineering costs associated with deploying a video network²⁴ are inappropriate and unnecessary.

IV. WIRELESS REPORTING IS NOT REQUIRED BY DIVCA

SureWest is correct that DIVCA does not support extension of broadband reporting requirements to wireless affiliates, and that such a requirement would produce competitively skewed and inaccurate results.²⁵ Verizon concurs with SureWest that reporting should be limited to *broadband services that use the cable or telephone network*, as this approach will address the PD’s concern about enforcement and do so in the most narrowly tailored way.

V. INTERVENOR COMPENSATION IS INAPPLICABLE TO DIVCA PROCEEDINGS

Parties who seek to reargue the availability of intervenor compensation ignore the fundamental conflict between those provisions²⁶ and DIVCA: the former applies to “utilities” and “utility customers,” while DIVCA specifies that holders are *not* utilities.²⁷ In addition, Section 1807 mandates *full recovery in rates* of any compensation award paid by a utility, but under DIVCA the Commission is *precluded* from regulating video

²⁰ See *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order FCC 05-150 (Sept. 23, 2005) ¶ 83 (where costs no longer used to set rates, safeguards against cross-subsidization no longer required); ¶ 133 (cost allocation results no longer affect basic rates; reduced LEC incentives to overstate costs reduces need for burdensome cost allocation processes).

²¹ TURN at 4-5.

²² 47 CFR 64.904.

²³ TURN at 5-6; See Verizon Reply Comments dated November 1, 2006, at 20-21 (rebutting TURN data).

²⁴ TURN at 4 (track video costs); DRA at 11, note 23 (financial and engineering costs of stand-alone basic telephone service and video service).

²⁵ SureWest at 2-3.

²⁶ Public Util. Code §§ 1800 et seq.

²⁷ § 5820(c).

service rates.²⁸ Therefore, imposing intervenor compensation awards on franchise holders would be an additional requirement outside the scope of DIVCA, and unlawful.²⁹ The only way to harmonize these two statutes is to conclude that intervenor compensation does not apply under DIVCA.³⁰

VI. MISCELLANEOUS CLARIFICATIONS SHOULD BE MADE TO THE PD

Verizon supports the following additional clarifications to the PD:

- The PD should eliminate language on local bonding authority, or clarify that it does not create an independent basis for bond requirements.³¹
- The bond requirement clearly applies per applicant, not otherwise, as AT&T suggests might be the case.³²
- DIVCA's non-discrimination obligations clearly apply to the video service area *as a whole*, not to non-contiguous sub-areas.³³

VII. OTHER PROPOSALS VIOLATE DIVCA AND SHOULD BE REJECTED

The following proposals violate DIVCA, are re-argument, and should not be adopted:

- Reporting of specific technologies offered to customers, above and beyond what DIVCA requires.³⁴
- Gathering diversity data not required by DIVCA, e.g., supplier diversity, management diversity, philanthropy, programming content, and conducting workshops and annual hearings.³⁵
- Additional reporting and/or review of video service areas for discrimination as part of the application process.³⁶

VIII. CONCLUSION

For the reasons set forth here and in opening comments, the PD should be modified as indicated and promptly voted out so video competition may begin without further delay.

²⁸ § 5820(c).

²⁹ § 5840(a). CFC implies that the Commission does not need statutory authority to provide intervenor compensation awards, CFC at 9, but that view is not sound. See, e.g., *Consumers' Lobby Against Monopolies v. PUC*, 25 Cal. 3d 891, 913, n. 10, 160 Cal. Rptr. 124 (1979)(decision to establish system for compensating public interest organizations for participation in PUC's quasi-legislative proceedings is legislative prerogative). In any event, any additional requirement to pay intervenor compensation awards would violate DIVCA.

³⁰ *Cacho v. Boudreau*, 40 Cal. 4th 341; 2007 Cal. LEXIS 217 (2007)("implied amendment" to existing statute disfavored; adopted only when there is no other rational way to harmonize statutes); citing *In re Sean W*, 127 Cal. App. 4th 1177; 26 Cal. Rptr. 3d 248 (2005)(later-enacted statute will not be interpreted so as to modify scope or effect of existing statute unless the "later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two").

³¹ AT&T at 2-3.

³² AT&T at 4.

³³ AT&T at 5.


³⁴ CFC at 5.

³⁵ Greenlining at 5-9, 14-18.

³⁶ Greenlining at 16-18.

Dated: February 13, 2007

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CERTIFICATE OF SERVICE

I hereby certify that: I am over the age of eighteen years and not a party to the within entitled action; my business address is 711 Van Ness Ave., Ste. 300, San Francisco, CA 94102; I have this day served a copy of the foregoing:

REPLY COMMENTS OF VERIZON CALIFORNIA INC.

by electronic mail to those parties on the service list shown below who have supplied an e-mail address, and by U.S. mail to all other parties on the service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of February, 2007, at San Francisco, California.

/s/Sonja Killingsworth

SONJA KILLINGSWORTH

Service List:

Rulemaking 06-10-005

CALIFORNIA PUBLIC UTILITIES COMMISSION

Service Lists

Proceeding: R0610005 - CPUC - CABLE TELEVIS

Filer: CPUC - CABLE TELEVISION

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